No. [redacted] 2

In the Supreme Court of the United States

OCTOBER TERM, 1958

RUDOLF IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus,
PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 23-53) is not yet reported. The opinion of the district court denying petitioner's pre-trial motion to suppress evidence (R. 239-246) is reported at 155 F. Supp. 8.

JURISDICTION

The judgment of the Court of Appeals (P t. 54) was entered on July 11, 1958. The petition for a writ of certiorari was filed on August 8, 1958. The juris-

diction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. (a) Whether agents of the Immigration and Naturalization Service (I.N.S.), when making a valid arrest under a warrant issued pursuant to 8 U.S.C., 1252(a) (which authorizes arrests pending a determination of deportability), may conduct a search incident to that arrest, and (b) whether the evidence supports the trial court's finding of fact, affirmed by the court below, that the I.N.S. officers who conducted the search acted in "good faith" for the purpose of seizing weapons and documents relating to petitioner's alienage and illegal status in the country.

2. Whether articles which were seized and later received in evidence were properly subject to seizure.

3. Whether the evidence supports the jury's finding that the information which it was the objective of the conspiracy to obtain and transmit to the U.S.S.R. was information relating to the national defense of the United States which was classified or otherwise unavailable to the general public.

4. Whether the testimony of a government witness, Sergeant Rhodes, that he, after being compromised, furnished information to Soviet agents in Moscow in 1952-3 and agreed to continue his cooperation upon returning to the United States, was properly admitted to corroborate the testimony of another government witness, Hayhanen, concerning his assignment in 1955 by petitioner to locate and report on a Sergeant Rhodes.

5. Whether, viewing the conduct of the trial as a whole, petitioner received a fair trial.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth and Fifth Amendments to the Constitution of the United States and the text of 18 U.S.C. 793, 794, 951 and 371 are set forth in Appendix C to the petition for certiorari (Pet. 55-60). The pertinent provisions of 8 U.S.C. 1103(a), 8 U.S.C. 1251(a)(5), 8 U.S.C. 1252(a), 8 U.S.C. 1305, 8 U.S.C. 1306, and 8 C.F.R. 242.2(a) are set forth in the Appendix, *infra*, pp. 26-27.

STATEMENT

Petitioner was indicted on August 7, 1957. The indictment (R. 7-19), in three counts, charged petitioner with having conspired, from about 1948 to the date of the indictment, (1) to communicate and transmit to the Union of Soviet Socialist Republics information relating to the national defense of the United States (conspiracy to violate 18 U.S.C. 794(a)), (2) to obtain documents and other materials connected with the national defense of the United States for the purpose of transmitting such documents to the U.S.S.R. (conspiracy to violate 18 U.S.C. 793), and (3) to act in the United States as an agent of the U.S.S.R. without prior notification to the Secretary of State (conspiracy to violate 18 U.S.C. 951).[1] After the district court heard and denied a motion, following a hearing, (R. 79-238) to suppress evidence alleged to have been obtained by unlawful search and seizure, petitioner was tried before a jury, convicted on all three counts, and on November 15, 1957, sentenced to a total of thirty years imprisonment and to pay a fine of $3,000. The

[1] 18 U.S.C. 794 and 793 each has its own conspiracy provision. Conspiracy to violate 18 U.S.C. 951 is punishable under the general conspiracy statute, 18 U.S.C. 371.

conviction was affirmed by the Court of Appeals on July 11, 1958.

I. The events leading to petitioner's arrest are discussed at length in the memorandum opinion of the district court (R. 239-246) denying petitioner's motion to suppress, and in the opinion of the Court of Appeals (Pet. 30-35). Briefly, the following events took place:

On June 13, 1957 one Sam Papich, the F.B.I. liaison officer with the I.N.S. (R. 159, 198-199), informed Mario T. Noto, Deputy Assistant Commissioner for Special Investigations of the I.N.S., that the F.B.I. had information concerning an alien, petitioner, who had entered this country illegally, and who was suspected of engaging in espionage (R. 199-200). At Noto's request, Papich agreed to attempt to obtain additional information relating to petitioner's illegal entry and status (R. 200). Noto testified at the hearing on the motion to suppress that he had not asked Papich for any information concerning Abel's espionage activities because, he said, "my interest from a jurisdictional viewpoint is confined to the illegal status * * *." (R. 200; Pet. 31.) About a week later, Papich supplied the additional information which Noto had requested (R. 203-204). Thereafter Noto informed the F.B.I. that he intended quite shortly to order petitioner's arrest for failure to notify the Attorney General of his address (R. 207-208). After a further review of the evidence the I.N.S. finally concluded that there was sufficient basis for the issuance of a "show cause" order as to petitioner's deportability and decided that an administrative arrest warrant (a warrant used to hold aliens for deportation proceedings) should be drawn up (R. 33-37, 106-108, 115). It was Noto alone who

made the decision to use an administrative warrant rather than charge petitioner with a criminal offense[2] (R. 217-218, 220, 223-224).

The "show cause" order and arrest warrant were drafted in Washington (R. 163-164, 216) and taken by two I.N.S. agents to New York, where they were signed by the Acting District Director of the I.N.S. (R. 91-96). Noto, upon his own initiative, had instructed the two I.N.S. agents to communicate with the F.B.I. office in New York (R. 211) and, after the order and warrant were signed, they did so (R. 97-100, 134, 135, 137). The F.B.I. requested and was granted permission to talk with petitioner prior to his arrest, to determine whether he might agree to "cooperate" (R. 97-99, 140). However, the I.N.S. agents were not instructed that the arrest was contingent upon petitioner's willingness to cooperate (R. 140, 148; see, also, R. 177-184).

At approximately 7:00 A.M. on June 21, 1957, agents of the F.B.I. knocked on the door of petitioner's hotel room and gained admittance to it (R. 175, 241). They showed petitioner their credentials, stated that they were charged with the duty of investigating internal security matters, asked some questions, and solicited petitioner's "cooperation" in answering certain questions (R. 177-184). Petitioner answered some questions but refused to answer others. Finally, at about 7:30 A.M., the two I.N.S. agents, who had been waiting in an adjoining room, entered petitioner's room and arrested him (R. 33, 53, 67, 189). They then searched

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[2] The failure of an alien to notify the Attorney General of his address as required by 8 U.S.C. 1305 is a criminal offense under 8 U.S.C. 1306 and constitutes grounds for deportation under 8 U.S.C. 1251(a)(5).

the single eight by twelve-foot room in which petitioner was arrested (R. 142), for the purpose, as they testified, of finding weapons or evidence of alienage (R. 68, 141, 151, 166). The F.B.I. agents did not participate in this search (R. 113, 143-144, 151, 192-193).

Articles offered in evidence which were seized during this search were: (1) a birth certificate in the name of "Martin Collins"; (2) a birth certificate in the name of "Emil Goldfus"; (3) an international certificate of vaccination issued in the name of "Martin Collins"; and (4) a bank book issued in the name of "E. R. Goldfus" (R. 666-671). During the search petitioner was told that he could pack and take with him anything that he desired (R. 109, 112). While he was packing a suitcase, one of the I.N.S. agents noticed that he was trying to slip some papers up his sleeve. These papers were seized by the agent (R. 65, 109-110, 665). The only one that was introduced in evidence was a strip of graph paper containing a coded message in grouped digits (R. 665).

After he had packed, petitioner concluded that he "might as well check out of the hotel," and gave to an I.N.S. agent sufficient money to pay the rent due on his room (R. 167-168). This money was then taken to the hotel desk and petitioner was checked out (R. 69-70, 144-146, 659-661). After petitioner had left, F.B.I. agents, upon being assured by the hotel manager that petitioner had checked out, and with the manager's written consent, searched the room which petitioner had occupied (R. 70-71, 658). During this search the F.B.I. agents seized the entire contents of a wastebasket containing articles which petitioner had discarded while packing (R. 694). Two articles which had been in

the wastebasket were introduced in evidence: a piece of wood wrapped in sandpaper and containing a cipher pad, and a hollowed-out wooden pencil containing microfilm (R. 51, 694, 724-726).

On these facts the district court denied petitioner's motion to suppress, rejecting the contention that the evidence seized by the Government had been found during a search which violated the Fourth Amendment. The trial judge found that the search of petitioner's hotel room was made in good faith for the purpose of discovering weapons and documents relating to alienage and not, as petitioner contended, for the purpose of uncovering evidence of espionage (R. 243-245). The Court of Appeals accepted this finding and concurred in the holding of the district court that I.N.S. agents, in making an arrest pursuant to an administrative warrant, may, as an incident to that arrest, search the hotel room in which the arrest is made, for certain kinds of materials, without violating the Fourth Amendment (R. 243; Pet. 35).

II. At the trial, the following evidence was adduced:

Petitioner, a Colonel in the K.G.B., a Soviet espionage service (R. 287, 290), entered the United States illegally in 1948 from Canada (Ex. 86; R. 688-691) to serve as a resident espionage officer on behalf of the Soviet Union (R. 289-290, 310-311). In a rented studio in Brooklyn (Ex. 49; R. 543-544, 561-562) he assumed the role of an artist (R. 548, 707) and the identity of Emil Robert Goldfus (R. 545, 548, 561-562, 664, 691, 707), an infant who had died in 1903 (Ex. 83; R. 678-681). On occasion he used the name Martin Collins (R. 598, 635, 636, 657, 667, 713; Exs. 74, 75, 76, 78).

In 1952, Reino Hayhanen,[3] then a Major in the K.G.B. (R. 297) and the Government's chief witness at the trial, arrived in New York City (R. 351) under orders to act as petitioner's assistant in espionage work (R. 289-290).

Before leaving Moscow for the United States, Hayhanen assumed the identity of one Eugene N. Maki, who was born in Idaho (R. 288, 298-300). Hayhanen received special training in making "microdots" and preparing "soft film"[4] (R. 304); he was schooled in cryptography and was assigned a personal code for communicating with Soviet officials (R. 467-468); he was assigned the cryptonym "Vik" (R. 305, 356); and he was trained in the method of transmitting messages in hollowed-out containers made from coins, bolts, screws, etc. (R. 305; and see, *e.g.*, Exs. 23, 45, 65, 87, 91, 91a, 92, 93, 94, 95, 96) by placing the container with the hidden message at a prearranged "drop" point[5] where

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[3] Hayhanen was born in the U.S.S.R. and entered the Soviet State Security Service in 1939 (R. 290-291). He functioned as a counter-espionage agent until 1948, at which time he was summoned to Moscow and advised that his assignment had been changed to espionage work (R. 295). While in the United States in 1956, he was advised by petitioner that he had been promoted to Lieutenant Colonel. He also received a message from Moscow announcing the promotion and extending greetings (R. 457-458).

[4] A "microdot" is a photographic reduction of a document (R. 720); "soft film" is film that is made pliable by a chemical process (and is therefore capable of being rolled and placed in a small cavity, such as a hollowed-out pencil or bolt) (R. 329, 529).

In addition to his microdot training in Moscow, Hayhanen received instruction on the subject from petitioner, who told him of an easier method which he ordered him to practice (R. 464-466).

[5] Hayhanen, before leaving Moscow in 1952, was assigned three "drop" points in New York City—one was located in a wall in the Bronx (Ex. 2; R. 318-319), the second was under a Central Park bridge (Ex. 3; R. 320-321), and the third was under a lamp post (Ex. 4; R. 324).

it would be picked up on signal by another agent (R. 317, 328, 347).

Also prior to Hayhanen's departure from Moscow he was instructed by a superior that his assignment was to assist petitioner in supervising illegal agents in the United States and to obtain whatever espionage information they could furnish, depending on the identity of the agents, the jobs they held, their acquaintances, and similar circumstances. His mission, he testified, was to obtain military information relating to the defense of the United States, including "atomic secrets" (R. 310-315).

Hayhanen spent his first year and a half in the United States establishing himself in New York City. During that time (1952 to 1954) he communicated with the Soviets and received instructions through "drops".[6]

[6] A message directed to Hayhanen from Moscow at about this time evidently became mislaid. In the summer of 1953, a newspaper delivery boy in Brooklyn, while collecting on his route, accidentally dropped a nickel which he had received (Ex. 60). The nickel split into halves, revealing a piece of microfilm (Ex. 61; R. 569-571, 575). The nickel and the film were turned over to the Federal Bureau of Investigation by a New York City police detective, who received it from the newsboy (R. 572-574). The microfilm contained a numerical code message (Ex. 62; R. 575-576). In or about May, 1957, the FBI applied Hayhanen's individual code system to the message (R. 577-582). The message, deciphered into the Russian language (Ex. 63) and translated into English (Ex. 64), reads as follows:

1. WE CONGRATULATE YOU ON A SAFE ARRIVAL. WE CONFIRM THE RECEIPT OF YOUR LETTER TO THE ADDRESS "V REPEAT V" AND THE READING OF LETTER NUMBER 1.

2. FOR ORGANIZATION OF COVER, WE GAVE INSTRUCTIONS TO TRANSMIT TO YOU THREE THOUSAND IN LOCAL (CURRENCY). CONSULT WITH US PRIOR TO INVESTING IT IN ANY KIND OF BUSINESS, ADVISING THE CHARACTER OF THIS BUSINESS.

3. ACCORDING TO YOUR REQUEST, WE WILL TRANSMIT THE FOR-

[Continued]

(R. 353-356, 359-360, 366-368, 375-377), and through personal meetings with Mikhail N. Svirin, (R. 333, 360-365, 365-366), a member of the Soviet delegation to the United Nations (Ex. 38; R. 502-504).

Hayhanen first met petitioner in July or August 1954, when Hayhanen received instructions through a drop that he would be met by someone at a theatre in Flushing, New York. Hayhanen, as a means of identification, was instructed to wear his blue tie with red stripes and to be smoking a pipe. At this first meeting, petitioner expressed surprise that they were not ordered to meet earlier and stated they would have to consider a suitable "cover" employment for Hayhanen that would leave him enough free time "for espionage work." (R. 377-380.)

Prior to this time, Hayhanen had received his salary through drops; but thereafter he was paid by petitioner (R. 383). Subsequent to this meeting, petitioner and Hayhanen met once or twice a week (R. 385), but the latter never knew petitioner by any name other than the cryptonym "Mark" (R. 289). During various conversations petitioner told Hayhanen of the location of his drops and signal areas, and, on occasion, used a drop in Hayhanen's presence (R. 385-393). One message, recovered by F.B.I. agents in May, 1957, from a

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[Footnote 6 Continued]

MUSA FOR THE PREPARATION OF SOFT FILM AND NEWS SEPARATELY, TOGETHER WITH (YOUR) MOTHER'S LETTER.

4. IT IS TOO EARLY TO SEND YOU THE GAMMAS (MEANING HERE UNKNOWN, LITERALLY MUSICAL EXERCISES). ENCIPHER SHORT LETTERS, BUT THE LONGER ONES MAKE WITH INSERTIONS. ALL THE DATA ABOUT YOURSELF, PLACE OF WORK, ADDRESS, ETC., MUST NOT BE TRANSMITTED IN ONE CIPHER MESSAGE. TRANSMIT INSERTIONS SEPARATELY.

5. THE PACKAGE WAS DELIVERED TO YOUR WIFE PERSONALLY. EVERYTHING IS ALL RIGHT WITH THE FAMILY. WE WISH YOU SUCCESS. GREETINGS FROM THE COMRADES. NUMBER 1, 3RD OF DECEMBER.

drop that had been cemented over, was typed on petitioner's typewriter and concealed in a hollowed-out bolt (Exs. 52, 65, 66, 67; R. 548-551, 586-588, 590-598).[3]

In 1954 petitioner received a message from Moscow with orders to locate a Roy A. Rhodes, a Soviet agent known by the cryptonym "Quebec" (R. 394-395). The message described "Quebec" as an American Army sergeant who had been compromised by the Soviets while in Moscow in 1952.[4] The assignment of locating

[3] The message read:

"Nobody came to meeting either 8th or 9th at 203 2030 as I was advised he should. Why? Should he be inside or outside? Is time wrong. Place seems right. Please check".

[4] The typed message on microfilm reads as follows (Ex. 18; R. 536-537; see also Exs. 45, 46, R. 528-530):

QUEBEC. Roy A. Rhodes, born 1917 in Oilton, [*sic*] Oklahoma, U.S. senior sergeant of the War Ministry, former employee of the U.S. Military Attache Staff in our country. He was a chief of the garage of the Embassy.

He was recruited to our service in January 1952 in our country which he left in June 1953; recruited on the basis of compromising materials, but he is tied up to us with his receipts and information he has given in his own handwriting.

He had been trained in code work at the Ministry before he went to work at the Embassy, but as a code worker he was not used by the Embassy.

After he left our country he was to be sent to the school of communications of the Army C-I Service which is at the city of San Luis, California. He was to be trained there as a mechanic of the coding machines."

He fully agreed to continue to cooperate with us in the States or any other country. It was agreed that he was to have written to our Embassy here special letters, but we had received none during the last year.

It has been recently learned that Quebec is living in Red Bank, N. J. where he owns [*sic*] three garages. The garage job is being done by his wife. His own occupation at present is not known.

His father—Mr. W. A. Rhodes resides in the US. His brother is also in the States where he works as an engeneer [*sic*] at an atomic plant in Camp, Georgia [*sic*] together with a brother-in-law of his father.

Rhodes was turned over by petitioner to Hayhanen (R. 395-403), who then journeyed to Colorado, telephoned Rhodes' sister, ascertained Rhodes' current address, and reported back to petitioner. Petitioner observed to Hayhanen that Rhodes could be a good agent because some of his relatives were "working on * * * military lands," referring to Rhodes' brother who petitioner believed was "working * * * in some atomic plant" (R. 396-401).

Petitioner stated to Hayhanen that he had received coded radio messages (R. 411) and, on one occasion, in Hayhanen's presence, attempted unsuccessfully to receive short-wave radio signals (R. 383-384). Petitioner also, among other things, instructed Hayhanen to go to Massachusetts where he unsuccessfully tried to locate a Soviet agent named "Olaf" (R. 405-407) and accompanied Hayhanen to Atlantic City in an effort to locate another Soviet agent (R. 407-408). Petitioner also stated that he had received instructions from Moscow to find a good location for an illegal short-wave radio station, which he then endeavored to do (R. 409-411).

In 1955, shortly before returning to Moscow for a visit, petitioner instructed Hayhanen to give $5,000 to Helen Sobell, wife of a Soviet agent in this country known by the cryptonym "Stone" (R. 412-417). Hayhanen converted the money to his own use (R. 455-456), but reported to Moscow that he had made delivery (R. 416).

After petitioner returned from Moscow in early 1956 (R. 561-565, 726-730) he next met with Hayhanen in the summer of that year and petitioner suggested that Hayhanen might go home to Moscow on leave (R. 424). Subsequently, Hayhanen received a message from Mos-

cow ordering him to return (R. 424-426). Petitioner, in early 1957, gave Hayhanen a fictitious Oregon birth certificate[9] in the name of Lauri Arnold Ermas to use in the event he was unable to use his United States passport (R. 427).

Hayhanen left the United States by ship on April 24, 1957 and surrendered himself to American Embassy officials in Paris, on May 4, 1957.

ARGUMENT

Petitioner was convicted by an overwhelming mass of uncontradicted evidence. His contentions as to an unlawful search and seizure, sufficiency of the evidence, and other alleged trial errors, were considered at length by the Court of Appeals, which unanimously affirmed his conviction. There is no occasion for further review by this Court.

1. *The search incident to the arrest.* (a.) Petitioner concedes that he was lawfully arrested under the warrant issued pursuant to 8 U.S.C. § 1252(a) and 8 C.F.R. 242.2(a) (*infra*, p. 27). It is also not disputed that, as we have noted, (*supra*, p. 5, fn. 2), petitioner's failure to notify the Attorney General of his address was a criminal offense under 8 U.S.C. § 1306, as well as grounds for deportation. Because the Government officials concerned determined that petitioner should be arrested under an administrative warrant pending deportation, rather than for the criminal offense, he urges that the I.N.S. agents lacked authority to search the hotel room in which he was arrested, incident to that arrest, for weapons and documents relating to alienage. The contention is without merit.

[9] Exhibit 19. See also R. 531-532, 537-538, 539-541, and Ex. 47, establishing the fictitious nature of the certificate.

It is well settled that a search may be made incident to a lawful arrest for a crime, with or without a warrant. See, *e.g.*, *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145. What has been considered crucial is the lawfulness of the arrest—*i.e.*, whether the officers are lawfully on the premises and have lawfully taken the subject into custody—rather than the nature of the offense charged. Petitioner having conceded, as the facts compelled him to do, that his arrest was lawful (R. 126-128), there is no logical basis here for limiting the power to search to arrests for crimes.[10]

Although this Court has never specifically addressed itself to the question whether a search of the person and his immediate surroundings may be made incident to an arrest under an immigration warrant[11] there is no rational basis, in this context, for distinguishing between arrests for deportation and arrests for crimes. As the Court of Appeals noted, "deportation, like punishment for crime, as Judge Byers stated below, 'is initiated in the interests of the United States and for the protection of its citizens.' * * * the procedure applicable to deportation proceedings, though in some respects different than that applicable to criminal pro-

[10] The fact that the warrant of arrest was administratively issued rather than by judicial process is not significant in the light of this concession. Of course, if the arrest were for any reason unlawful, the search would be invalid regardless of the nature of the underlying offense. In short, in this case, petitioner cannot show how, in this respect, he was in any wise prejudiced by the procedures followed.

[11] The only other federal courts which have been presented with the question have sustained the power to search. In *Diogo* v. *Holland*, 243 F. 2d 571 and *Da Cruz* v. *Holland*, 241 F. 2d 118, the Third Circuit, in *per curiam* orders, assumed, without discussion, that the power existed. See also, *Taylor* v. *Fine*, 115 F. Supp. 68, 70 n. 1 (S.D. Cal.) (dictum).

ceedings, see *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952), is in many ways similar. Arrest and detention are provided for by statute, see 8 U.S.C. § 1252(a), and indeed have been recognized by the Supreme Court as a necessary part of the deportation procedure. *Carlson* v. *Landon, supra*, at 538." (Pet. 36.) If, as this Court has repeatedly held, the denial of authority to law enforcement officers to conduct a search of the subject and the immediate premises in which he is arrested would too seriously interfere with the proper performance of the officers' duties, then, as the court below stated (Pet. 37), "* * * there would appear to be no basis for distinguishing between the right of government agents to conduct a search incident to a lawful arrest for commission of a crime and their right to conduct a search incident to a lawful arrest in connection with deportation proceedings. The grounds of public policy and convenience which justify the former are no less strong in the case of the latter."

It seems clear, therefore, that some authority to search must exist in connection with an arrest on an I.N.S. warrant and, we submit, the reasonableness of the scope of the search must be governed by the same tests which govern the validity of searches conducted incident to arrests for crimes.

(b.) Petitioner consistently has relied for his "lack of good faith" argument, not on the question of the reasonableness of the search as actually conducted by the I.N.S. arresting officers, but on his own inference, contradicted by direct evidence, that I.N.S. made the arrest for the sole benefit of the F.B.I. in furtherance of the latter's counter-intelligence function and for the purpose of uncovering evidence of espionage (Pet. 13-15; and see R. 22-27, 71-72, and Pet. 38-39).

It was principally with this contention that the hearing on the motion to suppress was concerned.

The evidence adduced at the hearing is uncontradicted that the search conducted incident to petitioner's arrest was conducted by I.N.S. officers, not the F.B.I., and the I.N.S. officers testified positively that they searched for (in addition to weapons) documentary materials relating to petitioner's identity and alienage (R. 65, 68, 102, 109, 141, 150). The trial court, expressly addressing its attention to the requirement of "good faith" laid down in *Harris*, 331 U.S. at 153, found the facts to be that there was no effort to enlist petitioner in counter-espionage activity and that the I.N.S. search was conducted in good faith (R. 243-245). This finding, unless it is so unsupported by the record that it is clearly erroneous as a matter of law, should be accepted as conclusive. *Davis* v. *United States*, 328 U.S. 582, 593; *Harris*, *supra*, at 153. We submit that the finding was amply supported by the evidence and that petitioner's contrary contentions, related solely to the particular facts of this case, do not require review by this Court.

An I.N.S. official testified that he alone made the decision to arrest petitioner for deportation and that his interest was only in petitioner's status as a deportable alien. The arrest was made on the basis of information furnished by the F.B.I., but I.N.S. on its own initiative decided to arrest petitioner pending deportation proceedings. An I.N.S. arresting officer testified that he had not been instructed that the arrest was contingent on Abel's not "cooperating" with the interviewing F.B.I. agents and that he had received no instructions to conduct a search for evidence of espionage. Two I.N.S. arresting officers testified that they had

searched for documents relating to petitioner's illegal status in the United States. On the basis of such testimony the Court of Appeals correctly held that the trial judge was not "bound to reject this direct evidence of good faith and instead base his findings upon the unsupported and contradicted inference which the appellant urges." (Pet. 39.)

2. *The propriety of the seizures.* A total of seven items found in the hotel room which petitioner occupied were introduced in evidence. Of these, five were seized by I.N.S. agents during the search incident to petitioner's arrest, and two were seized after he had checked out of his hotel room with his baggage.[12] Separate legal principles justify the seizure of each group of items.

(a.) Both courts below agreed that four items seized by I.N.S. officers during the search incident to the arrest were the "instrumentalities and means" by which petitioner maintained his illegal status in this country (R. 245; Pet. 41). These were two birth certificates in the names of Emil R. Goldfus and Martin Collins, respectively, the certificate of vaccination in the name of Martin Collins, and the bank book in the name of E. R.

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[12] With respect to items not introduced in evidence, petitioner does not contend, and indeed on the facts could not contend, that there was such a general seizure as would be violative of this Court's decision in *Kremen v. United States*, 353 U.S. 346. Petitioner's list of the items "seized" (contained in Exhibit D to his affidavit in support of the motion to suppress) includes the items which petitioner took with him as his baggage when he checked out of his hotel room. (R. 42-45.) The decision to take these items with him, to check out of the hotel room, and to abandon the remaining items, was made by petitioner, *not* the I.N.S. agents. (R. 167.). At the hearing on the motion to suppress, the bulk of the items listed in this Exhibit were stricken from the motion by stipulation. (R. 79-90.)

Goldfus (see *supra*, p. 6). These documents provided petitioner with the spurious identity which was essential to the maintenance of his illegal status in this country. As such they could properly be seized under the same general principle which permits the seizure, incident to a lawful arrest on criminal charges of, *inter alia*, "the means and instrumentalities by which the crimes charged had been committed." *Harris* v. *United States*, *supra*, 331 U.S. at 153, 154; *Agnello* v. *United States*, 269 U.S. 20, 30.

A fifth item found during the search by the I.N.S. officers and introduced in evidence was the code message taken from petitioner's person when he tried secretly to conceal it up his sleeve (see *supra*, p. 6). This message was subject to seizure to prevent the destruction of evidence, *Davis* v. *United States*, 328 U.S. 582, 609; *United States* v. *Rabinowitz*, 339 U.S. 56, 72, since it appeared on its face to be an "instrumentality" of the crime of conspiracy to commit espionage (of which crime the arresting officers were aware that petitioner was suspect). Arresting officers need not ignore material related to other crimes which they find on the subject's person during a lawful search. *Harris* v. *United States*, *supra*, 331 U.S. at 153-155; see, also, *Kelly* v. *United States*, 197 F. 2d 162, 164 (C.A. 5); *United States* v. *Braggs*, 189 F. 2d 367, 369 (C.A. 10). In the present case, the seizure of the code message resulted not from any effort of the searching officers to find materials other than documents showing the petitioner's alienage and identity but rather from petitioner's action in attempting to secrete the slips of paper on his person.

(b.) Two items were received in evidence which were seized by agents of the F.B.I. during their later search

of petitioner's vacated hotel room conducted with the written permission of the hotel management (R. 694). These were a cipher book and a hollowed-out pencil containing microfilm [13] (Exhs. 87, 88; R. 724-725, 727-731). These items were taken from the wastebasket into which petitioner had deliberately discarded them after he was given the opportunity to decide which property he wanted to pack and keep and which property he wanted to discard or leave behind (R. 109, 114, 663). Moreover, petitioner had permanently vacated the room when the search in which these items were seized was conducted. As the hotel manager testified, once petitioner paid his bill, turned in his key, and took out his baggage, he was no longer entitled to the room, which was then available to be rented to another guest (R. 659-661).

Since petitioner had voluntarily checked out of the hotel room (R. 167), and since the F.B.I.'s search of the room was with the specific consent of the hotel management, there can be no doubt that the search itself was entirely legal. *Davis* v. *United States*, *supra*, 328 U.S. at 593-594; *Reszutek* v. *United States*, 147 F. 2d 142 (C.A. 2). Furthermore, in view of petitioner's abandonment of the items by throwing them into the wastebasket and by checking out of the hotel room in which they were located, he is in no position to claim the protection granted by the Fourth Amendment. Cf. *Hester* v. *United States*, 265 U.S. 57; *Haerr* v. *United States*, 240 F. 2d 533, 535 (C.A. 5); *Lee* v. *United States*, 221 F. 2d 29 (C.A. D.C.); *Newingham* v. *United States*, 4 F. 2d 490, 493 (C.A. 3).

3. *The sufficiency of the evidence.* Petitioner, citing *United States* v. *Heine*, 151 F. 2d 813 (C.A. 2),

[13] Seven "letters" taken from this microfilm were received in evidence as Defense Exhibit F.

certiorari denied, 328 U.S. 833, and *Gorin* v. *United States*, 312 U.S. 19, argues (Pet. 10-11), in effect, that as a matter of law there was insufficient evidence to permit the jury to find that the information which petitioner conspired to gather and transmit to the U.S.S.R. was information relating to the national defense of the United States which was classified or otherwise unavailable to the public.[14] Despite petitioner's effort (Pet. 11) to cast this issue as a novel legal question all that is really involved is an attack on the sufficiency of the evidence.

However, the evidence overwhelmingly demonstrates that Hayhanen assisted petitioner, a superior officer, in Soviet espionage work in this country; that his specific task was to handle illegal Soviet agents and to gather for the U.S.S.R. secret information pertaining to the national security of the United States; that in pursuit of this task petitioner used false names, communicated with his co-conspirators by means of "drops," coded messages, and short-wave radio; that he purchased rare film specially suited to making "microdots"; and engaged in conduct of a like character.

Petitioner ordered Hayhanen to pay $5,000 to the wife of a Soviet agent, and on another occasion observed that Sergeant Rhodes ("Quebec") would be a good agent because his brother was working at an American atomic energy installation.

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[14] The jury was instructed:

> "In order to find the defendant guilty on Counts One and Two, you must find beyond a reasonable doubt that the information which he conspired to obtain and transmit was material relating to the national defense. And this means secret information, information not available to the public upon request." (R. 820.)

Petitioner was also shown to possess (in addition to the false identification papers, code message, pencil containers and cipher pad which were seized at the hotel room) the following classic implements of an espionage agent: a coded message, scotch-taped to the page of a book, apparently for purposes of photographing the same (Ex. 90; R. 696); two screws, one battery, one cuff link, and three tie clasps, all of which had been fashioned into "containers" with cavities large enough for the concealment of microfilm and other secret messages (Exs. 91, 91A, 92, 94, 95, 96; R. 700, 701, 722-723).[15]

As the Court of Appeals aptly stated (Pet. 47):

> [T]he jury cannot have failed to be impressed by the elaborate precautions taken by the conspirators to keep their activities secret. Men intent upon gathering and transmitting only such information as is available to the general public do not ordinarily find it necessary to employ secret codes, microdots; hollowed-out coins, pencils, or matchbooks; "drops"; and the variety of other devices which Abel and his colleagues used.

Clearly there is no need for further examination by this Court of the sufficiency of the evidence so carefully reviewed by the court below.

4. *The conduct of the trial.* Finally, petitioner engages in a general attack upon a wide variety of alleged

[15] Following the return of the indictment in this case, F.B.I. agents on August 16, 1957 secured a search warrant for a storage room used by petitioner. These items were seized under the search warrant on August 17, 1957 (R. 262-274, 695-701). An earlier search warrant for petitioner's studio was executed on June 29, 1957 (R. 247-261). But none of the items seized pursuant to this warrant was offered or received in evidence at the trial.

prejudicial errors in the conduct of the trial (Pet. 12-13, 16-22). Practically every claim of error is completely without merit; the others are mere *minutiae*, inevitable in any lengthy trial. But in no sense can the conduct of the trial be said to have resulted in such prejudice to petitioner that the affirmance of the conviction by the Court of Appeals requires review by this Court.

(a.) Petitioner attacks (Pet. 12) the admission of certain testimony which corroborated and amplified the testimony of an accomplice of the petitioner (Hayhanen) but which of necessity admitted certain criminal conduct on the part of the witness. Presumably this attack refers to the testimony of Sergeant Rhodes. As noted by the Court of Appeals, however, "the issue is not so much one of law as it is one of logic." (Pet. 51.) Both courts below, reviewing the particular facts and circumstances of this case, determined that the evidence was relevant and helpful.

Rhodes' testimony corroborated Hayhanen's in two vital aspects.[16] First, Hayhanen testified that petitioner had been instructed by Moscow to find Rhodes and that petitioner was anxious to do so. Rhodes' testimony supported this by establishing his own existence and by providing positive, direct evidence of the motive for locating him, *viz.*, his usefulness in Soviet espionage, as manifested by his past cooperation. Second, Hayhanen testified that petitioner was interested in Rhodes because of his access to secret military information, thus establishing that it was espionage activity in which petitioner was engaged. This

[16] Vigorous efforts had been made on cross-examination to impeach Hayhanen's credibility (R. 488-500). Indeed petitioner as-

was supported by Rhodes' testimony as to his past activities.

Thus, Rhodes' testimony not only supported and amplified Hayhanen's as to this matter and established an additional logical link between petitioner and the Soviet espionage system, but also tended to support a strong inference that Hayhanen was a trustworthy witness and that the remainder of his story was true. Given this importance and relevance of the Rhodes testimony, it can hardly be said to have been reversible error to admit it, even though it happened to involve an admission by the witness of a dishonorable and illegal role in the system with which petitioner was associated.

(b.) Petitioner also complains (Pet. 12) of allegedly prejudicial surplusage in the indictment. Here again petitioner is attacking a proper exercise of discretion on the part of the trial court. Two counts of the indictment included an allegation that petitioner and his co-conspirators "in the event of war . . . would engage in acts of sabotage against the United States." (R. 10, 16.) It is submitted that this allegation was relevant to establish a specific intent that the information which it was the object of the conspiracy to gather would be used to the advantage of the Soviet Union. The Court of Appeals agreed with petitioner that the allegation was surplusage, but ruled that it could not have been prejudicial, since "there was no testimony in the case concerning sabotage or a conspiracy to commit sabotage, and the jury was carefully instructed by

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serts (Pet. 4) that Hayhanen was thoroughly discredited. The jury, instructed that Hayhanen's testimony was the only testimony relating to the membership and purpose of the conspiracy (R. 810-811), obviously thought otherwise.

the trial judge that the indictment was not evidence and was not to be considered by them as evidence" (Pet. 52-53).

Moreover, the defense did not request the trial judge to instruct the jury further as to the significance of this allegation in the indictment.

(c.) As to the remaining errors alleged by petitioner—the alleged use of leading questions in examining Hayhanen (Pet. 17-20) and the general "conduct of trial" (Pet. 20-22)—the Government's position is well summarized by the Court of Appeals, which in discussing this point stated (Pet. 53):

> No purpose would be served by a detailed discussion of these alleged improprieties. As to some we do not find that any error was committed; others were matters within the discretion of the trial judge, who, in our opinion, did not abuse that discretion; and as to the remainder we think that the alleged errors were not so prejudicial as to require a new trial in this case where the "record fairly shrieks the guilt" of the accused. *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953).

We submit that even if this Court looks only to those specific instances upon which petitioner relies—taking them out of the context of a record which, as a whole, clearly manifests the fairness with which the trial was conducted—it will nevertheless be apparent that both courts below were clearly justified in holding that petitioner was afforded a fair trial.[17]

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[17] For example, petitioner claims (Pet. 18) that "[t]he sole testimony in the case relating to national defense information was extracted from the witness in this way [by leading questions] (313,

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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314) and misquoted back to the witness likewise (315, line 20)." The record references which petitioner offers in support of the former of these assertions—R. 313, 314—reflect, quite to the contrary of petitioner's charge, that the questions asked of Hayhanen on this subject were entirely proper non-leading inquiries, and, in any event, were not objected to. And Hayhanen's testimony was not "misquoted back" to him, as petitioner further charges. (Compare the record reference which petitioner cites for this assertion—R. 315, line 20—with R. 314, line 11.)

APPENDIX

8 U.S.C. 1103(a), 1251(a)(5), 1252(a), 1305, and 1306 provide in pertinent part as follows:

§ 1103. Powers and duties of the Attorney General and Commissioner; appointment and compensation of Commissioner.

(a) The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers * * * He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this chapter; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. * * *

§ 1251. Deportable aliens—(a). General classes.

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who——

* * * * *

(5) has failed to comply with the provisions of section 1305 of this title unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, * * *

§ 1252. Apprehension and deportation of aliens—(a) Arrest and custody; review of determination by court.

Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. * * *

§ 1305. Change of address.

Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General. * * *

§ 1306. Penalties—(a) Willful failure to register.

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, * * * shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both.

8 C.F.R: 242.2(a) provides in pertinent part as follows:

> At the commencement of any proceeding under this part, or at any time thereafter and up to the time the respondent becomes subject to supervision under the authority contained in section 242(d) of the act, the respondent may be arrested and taken into custody under the authority of a warrant of arrest issued by a district director whenever, in his discretion, it appears that the arrest of the respondent is necessary or desirable. * * *

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